Tribunal Order: 293

Before:

Metis Settlements Appeal Tribunal

Between:

Harry Supernault

Applicant

-and-

East Prairie Metis Settlement

Respondent

-and-

Tristyn Haggerty

Respondent

-and-

Metis Settlements General Council

Respondent

-and-

Metis Settlements Land Registry

Respondent

Concerning:

Membership

Hearing Date:

June 27, 2016

Decision Date:

October 11, 2016

DECISION

The Hearing – parties, place and date

Panel members:
Lorne Dustow, Panel Chair
David Drummond, Panel Member
Joyce Parenteau, Panel Member

Parties Present at the Hearing:
Harry Supernault, Applicant

Tristyn Haggerty, Respondent
Represented by: Chad Haggerty

East Prairie Metis Settlement, Respondent
Councilors: Colette Duh, Wade L'Hirondelle, Peter Patenaude
Jackie Bellerose, Interim Administrator

Observers:
Joan Haggerty, Violet Haggerty, Marcel Desjarlais, Karen Cunningham, Rose Prinz, Murielle L'Hirondelle, Ronald Bellerose, Lashay Chalifoux

Appeal Tribunal Staff Present at the Hearing:
BJ Simpson, Appeal Tribunal Officer
Harold Robinson, Tribunal Secretary

Place and Date of the Hearing:
East Prairie Communiplex
East Prairie Metis Settlement
June 27, 2016 at 3:45 p.m.

1.0 Context

[1] On September 21, 2015, East Prairie Metis Settlement (EPMS) Council approved Tristyn Haggerty's membership bylaw. Settlement member, Harry Supernault, appealed Council's decision on November 5, 2015. The Appeal Tribunal granted Harry permission to make an appeal because his appeal met the basic requirements (including the 45 day appeal deadline) set out in section 83(2) of the Metis Settlements Act[1] (MSA).

[2] This matter was heard at the East Prairie Metis Settlement Communiplex on June 27, 2016.

[3] A number of issues were discussed, including the following:

1) *Should the Tribunal's hearing into this matter on June 27, 2016 have been adjourned to allow Harry Supernault (Harry) to examine the ballot box from Tristyn Haggerty's (Tristyn's) first membership vote on March 3, 2015, or to allow him to examine the ballot box relating to the second bylaw vote on September 2, 2015?*
2) *Should Tristyn have been allowed to apply for another bylaw after her first bylaw application was defeated on March 3, 2015?*
3) *Should the second public meeting/bylaw vote (held on September 2, 2015) that recommended Tristyn for membership be set aside if it is proven on the balance of probabilities that terminal errors were made in the way the vote was recorded, or that Council corrupted the process by having staff attend the public meeting?*
4) *Did EPMS Council properly execute its statutory duties in reviewing and approving Tristyn's membership application? What deference is owed to Council in this regard?*
5) *Harry alleged that a fellow Tribunal member is a registered Indian and that this fact means that the Tribunal is bias. Has Harry raised a real or reasonable apprehension of bias?*
6) *Section 75 of the MSA enables a person to apply for membership in a Metis settlement, providing they were registered as an Indian after 1990 and before they turned 18 and that they meet certain other conditions. Is section 75 outside of the power (ultra vires) of the Province of Alberta?*

[1] *Metis Settlements Act* [RSA 2000, Chapter M-14]

[4] The Panel carefully considered each issue that falls within its mandate and while certain irregularities are present, we do not think it appropriate to overturn Tristyn's membership bylaw.

1.1 Evidence before the Panel

Harry Supernault

[5] Harry said that he asked EPMS Council for documents relating to the public meetings/votes on Tristyn's membership bylaw. He said that he asked for the voting lists, confirmation that voters were not subject to the automatic termination provisions in the MSA when they voted, and to open the ballot boxes in question. Harry said that Council refused his request.

[6] Harry said that he also asked for the minutes concerning EPMS Council's decision to allow a second bylaw vote for Tristyn and was apparently told he would have to FOIP them. Harry asked for an adjournment so that the documents related to the public meetings/bylaw votes and EPMS Council's resolutions on this matter could be produced, or compelled, and additional time be given to review the documents and make submissions on them.

[7] In terms of the bylaw making process itself, Harry said that it was wrong to put forward another membership bylaw for Tristyn after her first membership was rejected at a public meeting. He said that the MSA does not permit the same bylaw to be raised so soon after it is rejected at a public meeting, but did not point out which part of the MSA disallows a bylaw from being considered a second time.

[8] With respect to the records that were produced concerning the second public meeting/bylaw vote, Harry said that the Ballot Account form at Tab 13 of the Hearing Kit is terminally flawed. The Ballot Account form shows how many ballots were supplied, not used, spoiled and shows the ballot count for Tristyn (and for Brendon). Harry drew our attention to the fact that the number originally beside the "number of ballots not used" has been scratched out and that while the overall numbers balance out for Tristyn at 52 ballots distributed and accounted for, the number of ballots distributed and accounted for Brendon are off by 2. [2] According to Harry, the fact that the flaws are all on the same form requires that the outcome of the vote be reviewed and overturned.

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[2] The Ballot Account for the East Prairie Metis Settlement Business Membership Admission Bylaws form [TAB 13] has both Tristyn [EPMA060] and Brendan [EPMA061] on the same form, with figures for total

[9] Harry also questioned whether sufficient notice was given of the public meeting concerning Tristyn's membership vote. The notice document at Tab 11 of the Hearing Kit shows that notice of the public meeting was posted on August 18, 2015. Apart from raising his concern, Harry did not say what the notice requirement was or how the notice given failed to meet any particular requirement.

[10] Harry said that Council ordered staff to attend the public meeting concerning Tristyn's bylaw vote to ensure the quorum requirements were met. Harry suggested that this action shows that Council had a vested interest in the outcome and, at a minimum, was not playing the part of neutral arbitrator over the voting process.

[11] Harry questioned whether Tristyn's membership application was complete. He said that her application was missing the statutory declarations of two recognized elders and other documents called for in section 76(b) of the MSA, namely:

> **Proving Metis Identity**
> 76 Every application for membership in a settlement must be sent to the settlement office and must be accompanied by
>
> (a) a statutory declaration that
>
> (i) the applicant has Canadian aboriginal ancestry, describing the facts on which the declaration is based, and
>
> (ii) the applicant identifies with Metis history and culture;
>
> (b) one or more of the following
>
> *(i) genealogical records as evidence that the applicant has aboriginal ancestry;*
>
> *(ii) a statutory declaration of at least 2 Metis who are recognized as Metis elders that the applicant has aboriginal ancestry, describing the facts on which the declaration was made;*
>
> *(iii) such other evidence satisfactory to the settlement council that the*

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ballots supplied of 52; number of ballots not used [original number scratched out] 3; spoiled ballots 1; count of ballots in favour of EPMA060 [Tristyn] 28, count of ballots not in favour of EPMA060 20 [which corresponds to the total number distributed, not used and spoiled // and, additionally, a count of ballots in favour of EPMA061 [Brendon] 26 and not in favour at 20 leaving a discrepancy of 2 ballots concerning Brendon's application on the form.

applicant has aboriginal ancestry. [emphasis added].

[12] According to Harry, EPMS Council should not have let Tristyn's application go forward to the bylaw process, or approved it after the fact, without all the required documents.

[13] Harry said that the Appeal Tribunal's neutrality is also compromised. He claims that Tribunal Vice-Chair Don Cunningham (who is not part of this Panel) is a registered Indian and, as such, Tribunal decisions are tainted.

[14] Harry also took issue with the order in which submissions were given at Tristyn's hearing. He complained about going last—after EPMS Council and after Tristyn's representative (Chad Haggerty)—suggesting that this showed bias on the part of the Tribunal.

[15] Finally, Harry questioned where the Government of Alberta "gets the authority to turn an Indian into a Metis." His argument is that the Supreme Court of Canada (in Cunningham[3]) affirmed Alberta's authority to establish an ameliorative legislative framework for Metis, including defining membership and the right to terminate the membership of those who voluntarily became registered Indians after 1990 (and after they turned 18 years old), it does not grant Alberta authority over Indians or the ability to "turn an Indian into a Metis;" which is what he says is being done when registered Indians are allowed membership through the section 75 bylaw process.

EPMS Council

[16] EPMS Council confirmed that they considered and applied the membership criteria set out in the MSA concerning Tristyn's membership application, including section 74 through 78 of the MSA.

[17] In particular, EPMS Council was satisfied that Tristyn satisfied the admission requirements set out in sections 74 and 75 of the MSA to be considered through the section 75 bylaw process. EPMS also confirmed that they did not think it inappropriate to allow a second bylaw vote to be held for Tristyn after the first bylaw was rejected. EPMS confirmed that they were satisfied that Tristyn has aboriginal ancestry and that she identifies with Metis history. Finally, EPMS confirmed that Tristyn has suitable living accommodation in EPMS and that she is committed to living in the settlement area and preserving a peaceful community.

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[3] See Cunningham v. Alberta (Aboriginal Affairs and Northern Development), 2009 ABCA 239

Tristyn Haggerty

[18] As allowed by the Tribunal's Rules of Procedure and as is common in Metis communities and culture, a family member spoke for Tristyn Haggerty. In this case, it was her uncle, Chad Haggerty.

[19] Chad acknowledged that Tristyn had applied for membership once before but that she lost the first bylaw vote [on March 3, 2015] by one vote. He said that there is nothing in the MSA prohibiting a person from re-applying for another membership bylaw if the first application was not successful. Chad also questioned whether Harry could raise questions about the first bylaw without giving clear notice of his intention to do at least five days before the hearing by asking to include the issue in the Dispute Resolution Officer Report set out in the front of the Hearing Package.

[20] Chad said that there was no need to adjourn the proceedings on June 27, 2016 to check into the vote or minutes concerning the first bylaw vote [in March 2015] because that matter was not before the Tribunal. The matter put before the Tribunal by Harry Supernault concerns approval of Tristyn's second membership application. Furthermore, according to Chad, Harry did not ever itemize the things he was looking for or make any request in writing, and that without proof to the contrary there is nothing to show that a proper request was made for the information Harry is now asking to be produced and additional time to review. Chad said that due diligence has to be exercised by all appellants, and that it wasn't exercised by Harry.

[21] Chad said that Tristyn met all the membership requirements set out in the MSA. He said that as set out in her membership application[4] Tristyn:

- met the requirements in section 74 of the MSA in that she:
  - is a Metis and was at least 18 years old when she applied;
  - has lived in Alberta for 5 years immediately before applying;
- met the requirements set out in section 75 of the MSA in that she:
  - was registered as an Indian before she turned 18 years old;
  - lived a substantial part of her childhood on EPMS;
  - that her mother and father are members of the EPMS;
  - and that she was approved through the bylaw process, including a successful outcome at the public meeting on September 2, 2015 of 28 for v. 20 against;

[4] See Tab 8, Hearing Kit, Harry Supernault and EPMS/Tristyn Haggerty, June 27, 2016 – Membership application

- met the requirements in section 76 of the MSA for proving Metis identity in that her membership application was accompanied by:
    - a statutory declaration declaring her Canadian aboriginal ancestry and that having been raised in EPMS, she identifies with Metis culture and considers EPMS her home;
    - other evidence that the applicant has aboriginal ancestry including common knowledge of her family tree in EPMS that includes her maternal grandparents who are both members of EPMS and her paternal grandfather, the late Victor Prinz, Sr., who is a decorated aboriginal war hero[5];
- met the requirements in section 78 of the MSA in that Tristyn:
    - is a person of Canadian aboriginal ancestry who identifies with Metis history and culture, including self-identifying as Metis [and as Status Indian/First Nation] at school[6];
    - has suitable living accommodations in the settlement area; and
    - is committed to living in the settlement area and preserving a peaceful community as shown by the numerous certificates for youth leadership.[7]

[22] Chad said that it does not matter whether staff attended the public meeting concerning Tristyn's membership bylaw on Council's orders or on their own. He said that staff are members and that members have a right to attend public meetings.

[23] Chad said that while the Appeal Tribunal does not have the authority to deal with constitutional challenges, section 75 has already been reviewed by the Supreme Court of Canada in the Cunningham decision and found to be valid. According to Chad, this means that the Cunningham decision does not stand for the proposition that registered Indians can't apply for membership on the Metis Settlement, as suggested by Harry. In Chad's view, there is no question that registered Indians can apply for membership on the Metis Settlement and that people like Tristyn should be given a fair opportunity to do so; providing they meet all the requirements in the MSA.

[24] Chad also pointed out that the definition of Metis has been broadened over time. Where the legislated definition of Metis once excluded those who were registered Indians, or those who could become registered Indians, from gaining membership in a Metis colony [as a Metis settlement was then known], that definition no longer applies. It was expanded to now include a mechanism through section 75—which Chad points out was unanimously

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[5] See Tab 20, Hearing Kit, Harry Supernault and EPMS/Tristyn Haggerty, June 27, 2016 – Tristyn Haggerty's Family Tree dated March 16, 2015

[6] See Tab 22, Hearing Kit, Harry Supernault and EPMS/Tristyn Haggerty, June 27, 2016 – School Record

[7] See Tab 21, Hearing Kit, Harry Supernault and EPMS/Tristyn Haggerty, June 27, 2016 – Certificates

approved by the Metis Settlements leadership—for registered Indians to apply for membership providing they meet the conditions set out in section 75.

1.2 Findings of Fact

- On June 11, 2015, Tristyn Haggerty applied for membership into EPMS. Her membership application contained the following information:
  - Front Page: Personal information; place of residency; reason for applying ("reached 18 years of age. Settlement is my home"); Applicant's father and mother's name;
  - Consent to disclosure of personal information;
  - Confirmation of Residence in the EPMS;
  - Form 1 Membership Application with information concerning registered Indian status, membership of parents in EPMS, where she lived a majority of her childhood, and that she plans on living there and is committed to preserving a peaceful community; and
  - Form 2, Membership Declaration that Tristyn identifies with Metis history and culture and the facts supporting that she has Canadian aboriginal ancestry, including family tree highlights going back to great grandparents.

- On August 17, 2015, Membership Admission By-law #EPMA060 for Tristyn Haggerty was approved for 1st and 2nd reading by EPMS Council.

- On September 2, 2015, the EPMS membership voted on Tristyn's bylaw. The results were itemized on the "Ballot Account for EPMS Business Membership Admission Bylaws," summarized below:

  - 52 ballots supplied
  - 3 ballots not used, with the initial number being scratched out
  - 1 spoiled ballot
  - 28 in favour
  - 20 against
  - The results for Brendon Desjarlais' membership bylaw were recorded on the same form, showing 26 in favour and 20 against with no other notations, leaving a discrepancy of 2 votes.

- On September 21, 2015, EPMS Council approved Tristyn's bylaw for 3rd reading and sent her a letter approving her membership into EPMS.
- On October 19, 2015 EPMS adopted its September 21, 2015 minutes approving Tristyn's membership. It is not clear if or when these minutes were posted.
- On November 5, 2015, Harry Supernault filed a membership appeal in writing with the Appeal Tribunal.

1.3 How the law applies to this matter

[25] This Panel will analyze the issues, arguments, facts, and law in the order set out above in the section marked "Context."

1) *Should the Tribunal's hearing into this matter on June 27, 2016 have been adjourned to allow Harry Supernault (Harry) to examine the ballot box from Tristyn Haggerty's (Tristyn's) first membership vote on March 3, 2015, or to allow him to examine the ballot box relating to the second bylaw vote on September 2, 2015?*

[26] Harry did not provide any prior notice in writing that he wished to adjourn the hearing to examine the ballot boxes to see if anyone voted whose membership was already or later terminated by the Metis Settlements Land and Membership Registrar under section 90 of the MSA.

[27] We considered Harry's request at the hearing and rejected it for a number of reasons.

[28] Firstly, we rejected Harry's request because Harry did not provide notice to the parties that he was seeking to adjourn the matter and granting his request would greatly inconvenience everyone; some of whom travelled for hours to attend the hearing.

[29] Secondly, we felt it would not be proper to grant access to the ballot box materials from Tristyn's first membership application because that matter was not appealed by Harry and therefore not properly before us. Furthermore, what is now known by all from the Court of Appeal's review of the *Isbister* decision[8] is that appeal deadlines cannot be extended for membership appeals and that the time for reviewing Tristyn's first membership application came and went in the spring of 2015.

[30] Thirdly, insofar as Tristyn's second membership application and matters at the public meeting are properly before us, the Panel does not think it appropriate to extend its review to include opening the ballot box from September 2, 2015 (to see if some members who may have voted for Tristyn were eventually terminated under section 90 of the MSA), because reviews of this nature—i.e. community votes—fall to the Court of Queen's Bench. And, even if such matters fall to the Tribunal because they are about granting membership and not electing councilors, this Panel does not think it likely or probable that such a review would uncover 8 voters (the difference between those "for" and "against") who both voted for Tristyn and were subsequently removed from the membership list. Indeed, as a matter of practice, some restraint ought to be demonstrated by decision makers before granting such access when such access is bound to disrupt the key principle of certainty necessary for stable governance and when granting such access is based on little more than mere conjecture.

[31] This is not to say that Harry is not entitled to question whether the public meeting held on September 2, 2015 was properly set up, or run, or the results properly tallied. Nor are we saying that Harry is not entitled to access the Council minutes leading up to and out of the granting of Tristyn's membership in EPMS.

[32] Harry asked if the notice requirements for the September 2, 2015 meeting were met. They were. In this regard, section 54 of the MSA requires that "at least 14 days public notice of the date, time and place of the public meeting must be given." From the hearing kit,[9] we see that EPMS posted a "Notice of Special General Meeting" on August 18, 2015 concerning Tristyn's membership bylaw. That notice was posted 15 days before the public meeting on September 2, 2015 and included information about the date, time and place of the public meeting.

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[8] See *Isbister v Metis Settlements Appeal Tribunal* 2015 ABCA 130 (Can Lii)

[9] See Tab 11, EPMS Notice of Special General Meeting.

[33] We also note that the EPMS Council minutes leading up to and including Tristyn's membership bylaw were produced and included in the hearing kit,[10] so it is unclear to us why an adjournment should be granted when the relevant materials have long been available for review. That noted, it bears repeating that Settlement Councils are required under section 44(1)(e) of the MSA to adopt and post all (non-confidential) minutes/resolutions in the settlement office for at least 15 consecutive days and that all members should be granted access to these minutes even after the posting period has come and gone. It's simply a matter of good governance.

2) *Should Tristyn have been allowed to apply for another bylaw after her first bylaw application was defeated on March 3, 2015?*

[34] For clarity, this question is not intended to allow an entry-point into Tristyn's first membership application. It only serves to acknowledge that there was one (on March 3, 2015) in order to frame the discussion about whether a second bylaw ought to have been entertained.

[35] Starting broadly, we know that the Metis Settlements of Alberta enjoy a delegated form of governance. Meaning, the Metis Settlements General Council and the Metis Settlement Councils have the authority to do the things that provincial legislation says they can do and, again, by extension, that all polices and bylaws must be consistent with provincial laws as required by section 72 of the MSA.

[36] What this means is that with respect to the question of governance, saying that a second bylaw can be passed because "nothing in the MSA that says it can't," is <u>not</u> the right approach. The right approach is to ask what types of bylaws can be made by Settlement Councils under the MSA (and MSGC Policies) and what the rules are for making bylaws.

[37] In this regard, the types of bylaws that can be made are set out in Schedule 1 of the MSA (and section 75 of the MSA in the case of membership bylaws for registered Indians), and the rules about how to make bylaws are set out in Part 2 of the MSA.

[38] As set out in Schedule 1, section 2(d) of the MSA, "A settlement council may make bylaws for the internal management of the settlement, including (d) applications for

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[10] See Tab 10 for EPMS Council minutes dated Aug 17, 2015 approving 1st and 2nd reading and moving forward to public meeting; See Tab 12 for Council minutes dated Sept 2, 2015 concerning outcomes of public meeting; and see Tab 15 for Council minutes dated Sept 21 approving 3rd reading of Tristyn's membership bylaw.

membership." This section is interesting in that it does double duty: it not only sets out the subject area or type of bylaw that can be made but it also enables settlements to set out a management framework for how they will deal with membership bylaws, including, say, putting rules in place to limit the same or similar bylaw from coming up again within a year (which is one of the rules concerning bylaws from petitions).[11] Of course, any new bylaw pertaining to the management of membership applications would have to be consistent with the objectives of the MSA, including its precepts such as Resolution 18 of the Alberta Legislature in 1985 that made striking a self-governance framework between Alberta and then Federation of Metis Settlements contingent on the establishment of "*fair and democratic criteria for membership* in settlement associations" [emphasis added].[12]

[39] That a settlement council can make a bylaw concerning the internal management of membership applications is not in doubt and that a settlement council can make a bylaw through the section 75 process (for "involuntary Indians") is also not in doubt. What this leaves is the question of how those bylaws can be made, and, specifically, whether the EPMS Council is empowered to make a membership bylaw for the same person only months after the first one failed at the public meeting.

[40] The rules for making bylaws are set out in Part 2, Division 4, sections 50 – 64, of the MSA. These sections require that every bylaw be given 3 distinct readings and not more than 2 readings at the same meeting;[13] that bylaws must be passed within 2 years of first reading;[14] that between 2nd and 3rd reading at least 14 days public notice of the time, place and date of the public meeting be given[15] and that quorum is reached at the public meeting (at least 15 members) and that a majority of the quorum vote in favour of the proposed bylaw.

[41] Taken together, these sections allow a settlement council to bring any bylaw within its scope of power (i.e. section 75 bylaws) forward providing that the mechanics for dealing with the bylaws are followed. Insofar as "defeated" bylaws are concerned, section 53 of the MSA tells us that the only consequence is that the readings are cancelled; which

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[11] See s. 60(4) MSA: "If the bylaw is defeated at the public meeting, the settlement council may refuse to receive a petition of a similar nature made within one year of the date of the public meeting."

[12] See *A Resolution Concerning an Amendment to the Alberta Act*, The Honourable Peter Lougheed Premier, June 3, 1985

[13] See section 52((1) of the MSA: Enactment of bylaws.

[14] See section 53(1)(2) of the MSA: Bylaws must be passed within 2 years of first reading otherwise the previous readings are cancelled. The same cancellation rule applies to bylaws that are defeated on second or third reading.

[15] See section 54 of the MSA: Public notice of bylaws.

arguably clears the way for another bylaw of similar or even identical nature to be brought forward.

[42] Before leaving this question, though, it is worth exploring how membership bylaws ought to be treated in particular. In this regard, it is important to note that if the vote of a public meeting is not in favour of the membership bylaw, the bylaw is defeated as per section 55(5) of the MSA, but that it is still for Settlement council to carry out its statutory duty and notify the applicant under section 83 of the MSA that their bylaw has been refused. Put another way, what the MSA contemplates is that rejected membership bylaws will firstly be dealt with through appeal, and not by bringing another identical, or similar, bylaw forward shortly after the first one is defeated.

[43] As we know, though, if a process is not clearly laid out, or if alternative paths are permitted, folks cannot be faulted for finding their own way forward. In the case at hand, this Panel understands that Council notified Tristyn about the rejection of her first membership application in March 2015 and that Tristyn appealed that decision to the Appeal Tribunal. However, she withdrew her appeal after securing the approval of her membership bylaw in September 2015.

[44] That Tristyn did what the MSA allows is not a reason for upsetting the approval of her membership bylaw. However, that question will continue to be asked about the propriety of putting successive and identical membership bylaws up for consideration until one of them passes, is a matter for the Metis leadership and Minister to examine and clarify the best way forward.

3) *Should the second public meeting/bylaw vote (held on September 2, 2015) that recommended Tristyn for membership be set aside if it is proven on the balance of probabilities that terminal errors were made in the way the vote was recorded, or that Council corrupted the process by having staff attend the public meeting?*

[45] The way in which the vote at the September 2, 2015 public meeting was recorded on the "Ballot Account for EPMS Business Membership Admission Bylaws" form was not free from errors. The initial number given for "ballots not used" was scratched out and replaced with the number 3, and the tally of ballots for the other membership bylaw candidate, Brendon Desjarlais, are 2 short of the total number of ballots distributed (52) at the public meeting.

[46] In our view, these errors are not suggestive of a deliberate attempt to skew the actual vote count, but are simply evidence of some sloppiness in recording the outcomes. Nor can it be said that the mistakes materially affected the outcome or legitimacy of the vote itself. No one contests that Tristyn "won" her membership vote 28 to 20 and that her numbers add up to the total number of votes distributed. While we would have preferred that the first number beside "ballots not used" have simply had a line drawn through it and been initialed by the official in charge, and that separate[16] Ballot Account forms were used—one for Tristyn and one for Brendon—these mistakes are not sufficiently material to set aside the bylaw vote of September 2, 2015.

[47] Insofar as having staff attend the public meeting on September 2, 2015, we know that this is common practice across all the settlements and common practice in EPMS. As indicated by Chad, most of the staff are also settlement members and entitled to attend these types of meetings. What matters is that there is no evidence before us that EPMS Council told any of its staff *how* to vote; which would have corrupted the process. However, to be clear, the mere presence of staff at public meetings is not sufficient to rule that the process is corrupted or should be overturned.

4) *Did EPMS Council properly execute its statutory duties in reviewing and approving Tristyn's membership application? What deference is owed to Council in this regard?*

[48] This Panel walked through the membership criteria set out in sections 74 through 78 of the MSA with EPMS Council at the hearing with a view to understanding if and how Council addressed the requirements for membership. In our view, EPMS Council addressed its mind to each requirement, including being satisfied that Tristyn's application form contained such other evidence under section 76(b)(iii) that the applicant has aboriginal ancestry, and, equally if not more important, that Tristyn identifies with Metis history and culture.

[49] In terms of deference, while the Tribunal enjoys the authority to make any decision that EPMS Council can make[17] the Tribunal must exercise restraint in this regard because the Metis Settlement's self-governance framework places a premium on local decision making; as do we. Put another way, providing that a settlement council's decision making process is reasonable—i.e. that they addressed their minds to the requirements set out in

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[16] See MSAT Order 197, January 21, 2009, in which the Tribunal recommends that separate ballots be used to record the votes for each membership bylaw applicant.
[17] See s. 190(j) of the MSA.

the MSA and reached conclusions that make sense—those decisions should stand. We are not judging these types of decisions by what we would have done (i.e. correctness), but by whether the local decision is reasonable.

[50] To be clear, we think EPMS Council's decision concerning Tristyn's membership application is reasonable in the circumstances.

5) *Harry alleged that a fellow Tribunal member is a registered Indian and that this fact means that the Tribunal is bias. Has Harry raised a real or reasonable apprehension of bias?*

[51] In general, bias exists when it is clear or reasonably certain that a decision-maker has closed his or her mind to the arguments and evidence before him or her.

[52] When alleging "actual bias," the parties might bring evidence forward that convincingly demonstrates that the decision-maker is framing or deciding the matter on an *irrelevant consideration* or *improper motive*. Harry is suggesting that if anyone on the Tribunal is a registered Indian that this alone is enough to find actual bias. We do not agree. In our view, the test for actual bias requires cogent evidence that a panel member is acting on considerations or motives that are irrelevant to the matter at hand, and there is no evidence of any such conduct before us.

[53] The test for "reasonable apprehension of bias" is whether an informed person, viewing the matter through to its conclusion, would perceive the decision maker to be biased. Again, no evidence has been presented to suggest that this Panel has closed its mind to the matters before it.

[54] Finally, in the interests of thoroughness, this Panel has addressed Harry's concern about the order in which parties spoke at the hearing on June 27, 2016. While we normally invite the Appellant to speak first and make his or her case, so to speak, our main goal is to give all the parties an opportunity to speak and to hear and respond to everything that is said. Providing that all parties had an opportunity to hear and speak to the arguments and evidence—which we think is certainly the case at hand—the order of speaking is not determinative of the larger question of fairness.

6) *Section 75 of the MSA enables a person to apply for membership in a Metis settlement, providing they were registered as an Indian after 1990 and before they turned 18 and that they meet certain other conditions. Is section 75 outside of the power (ultra vires) of the Province of Alberta?*

[55] When the Appeal Tribunal was established in 1990, it could and did deal with Constitutional and Charter challenges. That power was lost with the passage of the *Administrative Procedures and Jurisdiction Act* in 2005 and *Designation of Constitutional Decision Makers Regulation* in 2006, which limited questions of constitutional law only to tribunals listed in the regulation (which does not include the Appeal Tribunal). Whether Alberta was correct to make that change to the Metis Settlements negotiated self-governance framework is a matter of debate, but the fact remains that this Tribunal is not empowered to deal with the question of whether section 75 is ultra-vires to Alberta.

[56] That noted, while Harry's framing of the question—*can Alberta turn a registered Indian into a Metis through section 75 of the MSA*—suggests a constitutional question, we think that the issue before us is better left to the community to discuss and decide.. As suggested by Chad—and really by Harry as well—members make a community, not the Courts.

1.4 Decision

[57] Harry's appeal is dismissed.

Dated in the City of Edmonton, in the Province of Alberta on this 11th day of October 2016.

Lorne Dustow
Panel Chair